2009

Chad Nordgren v. IHC Health Services, Inc., dba Sevier Valley Family Clinic; Jeffrey Brown, Do, individiually,; Roger D. Blomquist, MD, individually : Brief of Appellant

Utah Court of Appeals

Craig G. Adamson, Craig A. Hoggan, Debra Griffiths Handley; Dart, Adamson, and Donovan; Attorneys for Appellant.
George T. Naegle, Anne D. armstrong, Cortney Kochevar; Richards, Brandt, Miller, Nelson; JoAnne E. Bott, David C. Castleberry; Manning, Curtis, Bradshaw, and Bednar; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

CHAD NORDGREN, Plaintiff and Appellant, vs. IHC HEALTH SERVICES, INC., dba SEVIER VALLEY FAMILY CLINIC; JEFFREY BROWN, DO, individually; ROGER D. BLOMQUIST, MD, individually; Defendants and Appellees.	**APPELLANT'S BRIEF** Appellate Case No. 20090698 CA

Appeal from the Sixth District Court, Sevier County, Utah
Judge Wallace Lee Presiding

George T. Naegle
Anne Armstrong
RICHARDS BRANDT MILLER & NELSON
299 South Main Street, Suite 1500
Salt Lake City, Utah 84111
Attorneys for Appellee Roger D. Blomquist, M.D.

Craig G. Adamson (00042)
Craig A. Hoggan (8202)
Debra G. Griffiths (8365)
DART, ADAMSON & DONOVAN
370 E. South Temple, Suite 400
Salt Lake City, UT 84111
Attorneys for Appellant Chad Nordgren

JoAnn E. Bott
David C. Castleberry
MANNING CURTIS BRADSHAW & BEDNAR
170 South Main Street, Suite 900
Salt Lake City, Utah 84101
Attorneys for Appellees IHC Health Services, Inc., dba Sevier Valley Family Clinic and Jeffrey Brown, D.O.

IN THE UTAH COURT OF APPEALS

CHAD NORDGREN, Plaintiff and Appellant, vs. IHC HEALTH SERVICES, INC., dba SEVIER VALLEY FAMILY CLINIC; JEFFREY BROWN, DO, individually; ROGER D. BLOMQUIST, MD, individually; Defendants and Appellees.	**APPELLANT'S BRIEF** Appellate Case No. 20090698 CA

Appeal from the Sixth District Court, Sevier County, Utah
Judge Wallace Lee Presiding

George T. Naegle
Anne Armstrong
RICHARDS BRANDT MILLER & NELSON
299 South Main Street, Suite 1500
Salt Lake City, Utah 84111
Attorneys for Appellee Roger D. Blomquist, M.D.

JoAnn E. Bott
David C. Castleberry
MANNING CURTIS BRADSHAW & BEDNAR
170 South Main Street, Suite 900
Salt Lake City, Utah 84101
Attorneys for Appellees IHC Health Services, Inc., dba Sevier Valley Family Clinic and Jeffrey Brown, D.O.

Craig G. Adamson (00042)
Craig A. Hoggan (8202)
Debra G. Griffiths (8365)
DART, ADAMSON & DONOVAN
370 E. South Temple, Suite 400
Salt Lake City, UT 84111
Attorneys for Appellant Chad Nordgren

LIST OF PARTIES

All parties involved in this appeal are identified in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. §78A-4-103(2)(j).

STATEMENT OF ISSUES

ISSUE NUMBER 1

Did the trial court commit reversible error when it determined that Mrs. Nordgren filed a "Claim" in the context of Utah Code Ann. §30-2-11(4), Utah's Loss of Consortium Statute, when she served her Notice of Intent to Commence Action on Appellees? (Issue preserved R. at 127(11-12, 20-22.)

Standard of Review

The trial court's ruling on Appellees' motion to dismiss is reviewed for correctness. *Russell/Packard Development, Inc. v. Carson,* 2005 UT 14, 108 P.3d 741.

ISSUE NUMBER 2

Did the trial court commit reversible error when it concluded that Utah Code Ann. §30-2-11(4) required Appellant to file his loss of consortium claim on the same day his wife served her Notice of Intent to Commence Litigation? (Issue preserved at R. at 42-46, R. at 45 (footnote 2), R. at 123-125 and R. at 127(8-12, 20-22).)

Standard of Review

The trial court's ruling on Appellees' motion to dismiss is reviewed for correctness. *Russell/Packard Development, Inc. v. Carson,,* 2005 UT 14, 108 P.3d 741.

ISSUE NUMBER 3

Did the trial court commit reversible error when it concluded that the Utah Healthcare Malpractice Act applied to Appellant's loss of consortium claim? (Issue preserved R. at 42-46, R. at 45 (footnote 2), R. at 123-125 and R. at 127(8-12, 20-22).)

Standard of Review

The trial court's ruling on Appellees' motion to dismiss is reviewed for correctness. *Russell/Packard Development, Inc. v. Carson,,* 2005 UT 14, 108 P.3d 741.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from Judge Wallace A. Lee's Memorandum Decision and Order on Appellees' Motion to Dismiss.

II. Course of Proceedings and Disposition Below

On September 15, 2008, Appellant filed a Complaint in the Sixth Judicial District Court, seeking damages for loss of consortium. (R. at 1-6.) Appellant's loss of consortium claim stems from damages that his wife, Mrs. Nordgren, claims to have suffered as a result of medical care provided by Appellees. (R. at 1-6.) Mrs. Nordgren's claims were not joined with the claims filed by Appellant in court. Instead, Mrs. Nordgren was required to pursue her claims against Appellees through binding arbitration, based on the terms of a Dispute Resolution Agreement that Mrs. Nordgren entered at the time she originally received care from one of the Appellees[1]. (R. at 36-38.)

[1] At the same time Appellant filed his Complaint, he also attempted to join in the Arbitration. Appellees have resisted his attempts to join in that proceeding as well.

Before she was aware that she had signed the Dispute Resolution Agreement, Mrs. Nordgren began the pre-litigation process pursuant to the Utah Healthcare Malpractice Act (the "Malpractice Act") by serving a Notice of Intent to Commence Action on Appellees. (R. at 36-38.) When Appellees made Mrs. Nordgren aware of the existence of the Dispute Resolution Agreement, she abandoned the pre-litigation process (before ever appearing before a pre-litigation panel or filing a complaint) and agreed to arbitrate her claims against Appellees. (R. at 36-38.)

After Appellant brought his loss of consortium claim, Dr. Blomquist responded to the Complaint by filing a Motion to Dismiss on December 29, 2008. (R. at 16-18.) In his motion, Dr. Blomquist argued that Appellant's loss of consortium claim should be dismissed because Appellant was required, pursuant to Utah Code Ann. §30-2-11(4), to file his claim at the time Mrs. Nordgren served her Notice of Intent to Commence Action. (R. at 16-18 and R. at 19-31.) On December 30, 2008, Dr. Brown and the Clinic subsequently joined in the Motion to Dismiss. (R. at 13-15 and R. at 112.) On January 23, 2009, Appellant filed his Memorandum in Opposition to the Motion to Dismiss. (R. at 35-61.) On February 11, 2009, Dr. Blomquist filed his Reply Memorandum (R. at 62-104.), and Dr. Brown and the Clinic filed a Joinder in Reply Supporting Dr. Blomquist's Motion to Dismiss (R. at R.108-111.)

Appellants right to participate in the arbitration proceeding was not before the trial court, was not a subject of the trial court's order and is not before the Court of Appeals.

Oral Argument on Appellees' Motion to Dismiss was made before the trial court on June 1, 2009. (R. at 119, R. at 120 and R. at 127[2].) On July 28, 2009, the trial court granted Appellees' Motion to Dismiss and issued its Memorandum Decision and Order on Motion to Dismiss (the "Memorandum Decision"). In the Memorandum Decision, the trial court concluded the following: (1) Mrs. Nordgren's Notice of Intent to Commence an Action constitutes a malpractice action under Utah Code Ann. §78B-3-403(16); (2) Mrs. Nordren's Notice of Intent to Commence Action constitutes a claim under Utah's loss of consortium statute, Utah Code Ann. §30-2-11(4); (3) Appellant was required under Utah Code Ann. §30-2-11(4) to file his Complaint on the same day that Mrs. Nordgren served her Notice of Intent to Commence Action; (4) Appellant's claim for loss of consortium made in his Complaint was untimely, and should be dismissed, because he did not file his Complaint at the time Mrs. Nordgren served her Notice of Intent to Commence Action. (R. at 120-126.)

On August 20, 2009, Appellant filed his Notice of Appeal. (R. at 128-129.) On September 21, 2009, the Utah Supreme Court assigned this case to the Court of Appeals. (R. at 134.) On September 28, 2009, Appellees filed a Motion for Summary Disposition. On October 20, 2009, the Court of Appeals denied Appellees' Motion for Summary Disposition.

III. Statement of Facts

---

[2] The Official Transcript from the June 1, 2009 oral argument is Page 127 of the record and comprises twenty-three (23) pages. Reference to the transcript shall herein refer to the indexed page in the Record and the specific page of the transcript, e.g. (R. at 127(13).)

On September 18, 2006, Mrs. Nordgren was diagnosed with colorectal cancer. Approximately nine months prior to this diagnosis, Mrs. Nordgren had visited Dr. Brown at the Clinic and complained of symptoms consistent with colon cancer. Dr. Brown and his nursing staff at the Clinic assumed Mrs. Nordgren's symptoms were related to kidney stones and ordered a CT Scan of Mrs. Nordgren's abdomen and pelvis. (R. at 2.) On December 21, 2005, Dr. Blomquist reviewed the CT Scan and confirmed that Jennie had kidney stones. Dr. Blomquist failed to notice, however, that the CT Scan also revealed a mass in Mrs. Nordgren's rectum. (R. at 1-6, 36-38.)

Mrs. Nordgren contends that Dr. Brown, Dr. Blomquist and the staff of the Sevier Valley Family Clinic breached their respective standards of care, and as a result, failed to timely diagnose Mrs. Nordgren's cancer. (R. at 1-6,36-38.) Because Mrs. Nordgren was not diagnosed with cancer in December of 2005, the cancer was allowed to continue to grow and spread, untreated, for over ten months. When Mrs. Nordgren was eventually diagnosed, the cancer had progressed to a stage 4. It has since spread from her rectum to her liver. (R. at 1-6,36-38.)

Prior to Mrs. Nordgren's diagnosis of cancer, Appellant was working as a real estate agent and a part-time developer. (R. at 4.) In the years preceding his wife's diagnosis, Appellant had success in his profession and was able to comfortably provide for his wife and their four children. However, while Mrs. Nordgren was fighting both colon and liver cancer, she was largely unable to care for her children or her home. Appellant assumed most, if not all, of his wife's responsibilities she had as a stay-at-home parent. (R. at 4.) For example, Appellant assisted his children in the morning to

get ready for school, drove them to and from school, prepared all their meals, helped with homework, bathed them and tucked them in at night. (R. at 4.) These duties, coupled with the emotional strain Appellant was feeling concerning his wife's health, severely impacted his ability to work and earn a living. Consequently, the Nordgrens lost their home, their two cars and have moments when they have no money to feed their children. (R. at 4.)

On June 12, 2007, Mrs. Nordgren began pursuing her medical malpractice claims against Appellees. (R. at 20 and R. at 37.) She did so by serving a Notice of Intent to Commence Action pursuant to the pre-litigation requirements contained in the Malpractice Act. (R. at 20 and R. at 37.) At the time, Mrs. Nordgren was unaware that she had signed the Dispute Resolution Agreement. When she learned from Dr. Brown of the existence of the Dispute Resolution Agreement, she withdrew her request for pre-litigation review and agreed to pursue her claims through binding arbitration. (R. at 20 and R. at 37.) Mrs. Nordgren never completed the pre-litigation process outlined in the Malpractice Act and never filed a complaint against Appellees. (R. at 37.)

On September 11, 2008, Appellant attempted to join the arbitration proceeding by serving the Notice of Claim upon Appellees pursuant to the terms of the Dispute Resolution Agreement. On September 11, 2008, Appellant also filed his Complaint with the Sixth District Court. (R. at 1-5.)

SUMMARY OF ARGUMENT

The trial court committed three separate reversible errors when it dismissed Appellant's Complaint. First, the trial court failed to recognize the difference between a

Notice of Intent to Commence Action and a malpractice action, when it ruled that Mrs. Nordgren filed a malpractice action by serving her Notice of Intent to Commence Action on Appellees, and that Mrs. Nordgren's Notice of Intent to Commence Action constituted a claim under Utah Code Ann. §30-2-11(4). Second, the trial court committed reversible error when it concluded that Utah Code Ann. §30-2-11(4) required Appellant to file his Complaint on the same day as his injured spouse filed her Notice of Intent to Commence Action. Finally, the trial court committed reversible error when it ruled that Appellant's loss of consortium claim is governed by the Utah Healthcare Malpractice Act.

The fundamental errors in the trial court's decision all stem from its conclusion that Mrs. Nordgren's Notice of Intent to Commence Action is actually a malpractice action under the terms of the Malpractice Act. In order to reach this conclusion, the trial court ignored the plain language of Section 78B-3-412(1) of the Malpractice Act, which makes a clear distinction between a Notice of Intent to Commence an Action and a complaint.

The trial court further compounded this error by concluding that Mrs. Nordgren's Notice of Intent to Commence Action constitutes a "claim" for purposes of Utah Code Ann. §30-2-11(4), and in turn, that Appellant lost his right to proceed with his loss of consortium claim because he did not file suit on the same day his wife made her "claim". This interpretation of the requirements of Utah Code Ann. §30-2-11(4) is contrary to Utah law, precedent from other jurisdictions, and well-established standards of statutory interpretation.

As an additional point of error, the Trial Court ruled that Appellant's loss of consortium claim fails under the restrictive umbrella of the Malpractice Act. This conclusion is contrary to the Utah Supreme Court's ruling in *Dowling v. Bullen*, 2002 UT 50, 94 P.3d 915.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT MRS. NORDGREN FILED A "CLAIM" IN THE CONTEXT OF UTAH CODE ANN. § 30-2-11(4) WHEN SHE SERVED HER NOTICE OF INTENT TO COMMENCE ACTION.

Appellant's complaint is based on Utah's loss of consortium statute, Utah Code Ann. §30-2-11(4), which provides:

> A claim for the spouses' loss of consortium shall be:
> (a) Made at the time the claim of the injured person is made and joinder of the actions shall be compulsory; and
> (b) Subject to the same defenses, limitations, immunities and provisions applicable to the claims of the injured person.

Section §30-2-11(4)(a). Relying on the language of Section 30-2-11(4)(a) that requires a claim to be "[m]ade at the time the claim of injured person is made", Appellees sought the dismissal of Appellant's Complaint because he did not file his Complaint on the day Mrs. Nordgren served her Notice to Commence an Action under the Malpractice Act. The trial court adopted Appellee's position, and in doing so, committed reversible error.

A. The trial court concluded that Mrs. Nordgren's Notice of Intent to Commence Action is malpractice action and, therefore, a "claim."

The record is clear that to this day, Mrs. Nordgren has never filed a medical malpractice claim with any court. Mrs. Nordgren undertook the statutory preconditions to filing a claim, on June 12, 2007, by serving a Notice of Intent to Commence Action on

Appellees by certified mail pursuant to Utah Code Ann. §78B-3-412(1) and requesting pre-litigation panel review. (R. at 20, R. at 37 and R. at 120.) However, Mrs. Nordgren never completed the pre-litigation process. Instead, she agreed to pursue her disputes pursuant to the terms of the Dispute Resolution Agreement. As such, she did not follow her Notice of Intent to Commence Action with an actual complaint.

In the face of these undisputed facts, the trial court erroneously concluded that Mrs. Nordgren filed a claim on June 12, 2007, thereby triggering an obligation for Appellant to file his Complaint the same day under Utah Code Ann. §30-2-11(4). The trial court reached this result through a series of misguided conclusions. First, the trial court concluded that Mrs. Nordgren's Notice of Intent to Commence Action constituted a malpractice action, as defined by Utah Code Ann. §78B-3-403(16). The trial court compounded that error when it explained that, "[a]lthough she never filed suit in court because she had an arbitration agreement, Plaintiff's spouse began her action on 12 June 2007", when she served her Notice of Intent to Commence a Claim. (R. at 127(123).) As the final step in the analysis, the trial court concluded, "[t]his Court finds this action a claim for the purposes of Utah Code Ann. §30-2-11(4)." (R. at 127(123-124).) In short, the trial court erroneously concluded that a Notice of Intent to Commence an Action equals a malpractice action under the Malpractice Act, and that a malpractice action equals a claim for purposes of Utah Code Ann.§30-2-11(4). This conclusion is contrary to the plain language of the Malpractice Act and Utah case law.

B. The trial court ignored well-settled principles of statutory interpretation.

In *Smith & Sons v. Utah Labor Commission,* 2009 UT 19, ¶ 7, 218 P.3d 580, the Utah Supreme Court held that when determining the meaning of a statute, "a court must first look to the words used by the Legislature, the statute's plain language." 2009 UT 19 at ¶ 7 (citing *Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt, Inc.,* 2006 UT 45, ¶ 9, 143 P.3d 278. The Supreme Court continued by explaining that "courts must also try to read the plain language of a statute as a whole, with due consideration of the other provisions and in an effort to interpret them in harmony with each other and 'with other statutes under the same and related chapters.'" *Id.* (quoting *State v. Schofield,* 2002 UT 132, ¶ 8, 63 P.3d 667.)

The trial court's decision hinges on its reliance on the Malpractice Act's definition of a malpractice action. In relying on that provision in the Malpractice Act, however, the trial court failed to consider other relevant provisions of the act that directly contradict its conclusions. Had it done so, and applied the standards set forth in *Smith & Sons*, the trial court would have discovered the Malpractice Act makes a clear distinction between a Notice of Intent to Commence an Action and malpractice action.

Utah Code Ann. §78B-3-403(16) contains the definition of a malpractice action. It provides:

> "Malpractice action against health care provider" means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death or otherwise, based upon alleged personal injuries arising out of health care rendered or which should have been rendered by the health care provider.

Utah Code Ann. §78B-3-403(16).

A Notice of Intent to Commence Action, on the other hand, is exactly what its title suggests: a condition precedent to the filing of a malpractice action. Section 78B-3-412(1) of the Malpractice Act provides:

> **Notice of intent to commence action.**
> (1) A malpractice action against a health care provider may not be initiated unless and **until** the plaintiff gives the prospective defendant or his executor or successor, at least 90 days' prior notice of intent to commence action.

Utah Code Ann. §78B-3-412(1) (emphasis added). After serving the Notice of Intent to Commence Action, a claimant must then proceed through the other pre-litigation requirements outlined in Sections 78B-3-416 through 78B-3-419 before she can even file a complaint.

Reading these complimentary statutory provisions together, it is apparent that a Notice of Intent to Commence Action is not a malpractice action under the terms of the Malpractice Act. Several additional affirmative step must be taken, including the actual filing of Complaint, before an action can begin[3].

C. The error in the trial court's interpretation is seen in its application.

Applying the plain language of Section 78B-3-403(16) and Section 78B-3-412(1) to the facts in this case, confirms the error in the trial court's ruling. Mrs. Nordgren served a Notice of Intent to Commence Action pursuant to §78B-3-412(1). She did not ever follow that notice with a complaint. She instead agreed to pursue her claims outside

[3] Tellingly, Utah appellate courts have affirmed trial courts' dismissals of complaints when plaintiffs served a Notice of Intent to Commence Action, yet failed to file a complaint within the time required by the Malpractice Act. *See Kittredge v. Shaddy, M.D.*, 2001 UT 7; *see also Harper v. Evans, M.D.*, 2008 UT App 165, 185 P.3d 573.

of courts pursuant to the parties Dispute Resolution Agreement[4]. She is currently engaged in that arbitration process. Based on the foregoing, it is apparent that the trial court erred, as a matter of law, when it concluded that Mrs. Nordgrens' Notice of Intent to Commence Action constitutes a malpractice action, and therefore, a "claim" for purposes of Utah Code Ann. §30-2-11(4).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT UTAH CODE ANN. §30-2-11(4) REQUIRED APPELLANT TO FILE HIS LOSS OF CONSORTIUM CLAIM ON THE SAME DAY HIS WIFE SERVED HER NOTICE OF INTENT TO COMMMENCE LITIGATION.

Based on its conclusion that Mrs. Nordgren's Notice of Intent to Commence Action constitutes a malpractice action and, therefore, a claim under Utah Code Ann. §30-2-11(4), the trial court ruled that Appellant was required to file his loss of consortium claim when Mrs. Nordgren served her Notice of Intent to Commence Action on June 12, 2007. This interpretation of Utah Code Ann. §30-2-11(4) is contrary to Utah law and well-established standards of statutory interpretation.

The Utah Supreme Court recently explained in *State v. Jeffries*, 217 P.3d 265, 2009 UT 57, that when interpreting a statute, the court will, "first look to the plain language of the statute to give effect to that language unless it ambiguous." 2009 UT 57 at ¶ 7. The Supreme Court further explained two primary exceptions to this plain language rule. First, the duty to give meaning to the plain language "should give way if doing so would work a result so absurd that the legislature could not have intended it." *Id*

[4] Appellant's position is consistent with the terms of the Dispute Resolution Agreement. Article 4(A) of that agreement plainly provides that by addressing her potential claim under the agreement, the statute of limitations on her ability to bring a claim is tolled.

at ¶ 8. Second, an exception applies that requires a court "to read and interpret statutory provisions in harmony with other provisions in the same statute and with other related statutes... In essence, statutes should be construed... so that no part [or provision] will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." *Id* at ¶9.

The facts in this case bring both exceptions to the plain language rule into play. Utah Code Ann. §30-2-11(4) provides:

> A claim for the spouses' loss of consortium shall be:
> a. Made at the time the claim of the injured person is made and joinder of the actions shall be compulsory; and
> b. Subject to the same defenses, limitations, immunities and provisions applicable to the claims of the injured person.

If Section 30-2-11(4)(a) is interpreted literally, a spouse can never have a claim for loss of consortium if his injured spouse resolves her claim outside of the judicial process and does not file a claim that can be joined. Such a reading of the statute renders other portions of the statute void and/or inoperable, and leads to an absurd outcome that could not have been intended by the legislature. As a result, Courts have read an exception into the language of Section 30-2-11(4)(a) to allow a plaintiff to pursue a loss of consortium claim (without joining a claim) where the injured spouse has resolved her underlying dispute without filing suit.

No Utah appellate court has ever addressed the ability of a spouse to bring a claim under Section 30-2-11(4) when the injured spouse has resolved her claims outside of the judicial process. However, a very similar situation was recently addressed by the United States District Court, Division of Utah, in *Crabtree v. Woodman*, 2008 WL 4276957.

Judge Campbell's decision in *Crabtree*, and the case law cited in that opinion, provide a clear and well-reasoned analysis of how the language contained in Section 30-2-11(4) should be applied to the facts in this case.

Crabtree stems from a car accident in which Mary Crabtree was seriously injured. Shortly after she was injured, Mrs. Crabtree settled her claims against all defendants. Despite this fact, Mary Crabtree subsequently filed suit against the defendants. Her husband also filed a claim for loss of consortium pursuant to Utah Code Ann. §30-2-11(4). In response, the defendants filed a motion to dismiss, asking the court to dismiss Ms. Crabtree's claims based on the prior settlement. The defendants also moved to dismiss Mr. Crabtree's claims based on the argument that, if Ms Crabtree's claims are dismissed, Mr. Crabtree cannot satisfy the technical requirement of Utah Code Ann. §30-2-11(4). Specifically, the defendants argued that Mr. Crabtree could not satisfy Utah Code Ann. §30-2-11(4) because his wife had not filed a valid claim that could be joined.

Judge Campbell addressed the validity of Mr. Crabtree's claims and Mrs. Crabtree's claims separately. In doing so, Judge Campbell ruled that Mr. Crabtree had a right to pursue a claim for loss of consortium even if his wife no longer had a valid claim that could be filed (because she had settled that claim before he ever filed suit). Judge Campbell relied on the Utah Supreme's Court's decision in *Progressive Cas. Ins. Co. v. Ewart*, 2007 UT 52, 167 P.3d 1011, to support the key proposition that "Utah treats a loss of consortium claim as a separate claim belonging to the non-injured spouse". *Id* at 4. Based on this premise, Judge Campbell ruled that a spouse can pursue a loss of consortium claim independently, even if the injured spouse settles her claim before ever

filing suit. Inherent in this decision is the conclusion that a spouse can proceed with a claim under Utah Code Ann. §30-2-11(4) even though he does not file his claim at the same time as his injured wife, or join the claim of his injured wife as anticipated in Utah Code Ann. §30-2-11(4)(a).

Without any Utah cases directly on point, Judge Campbell relied on the Minnesota Supreme Court Decision of *Huffer v. Kozitza,* 375 N.W. 2d 480, 482 (Minn. 1985). The analysis in *Huffer* is as helpful as, if not more than, the analysis in *Crabtree* because the *Huffer* Court more directly addresses the parallel issues involved.

In *Huffer*, a husband was injured in an automobile accident with Kozitza. After the accident, the husband and wife divorced. Three and a half years after the accident, the husband settled his claims with Kozitza before he ever filed suit. The wife did not enter into a settlement, and subsequently filed suit against Kozitza for loss of consortium. Like Utah law, Minnesota law requires a spouse to join its loss of consortium claim with the claim of the injured party. Therefore, because the husband had previously settled his claim, the trial court dismissed the wife's loss of consortium claim. On appeal, the Minnesota Supreme Court reversed the trial court. In doing so, the Minnesota Supreme Court held that the wife had an independent claim that she was free to pursue even if the she could not join her ex-husband's claim.

The *Huffer* court begins its analysis by explaining that as a general rule, a plaintiff is required to try his loss of consortium claim at the same time and in the same case as his wife's injury claim. When the wife has already agreed to resolve her claim through

settlement or other non-judicial means, however, a plaintiff's right to bring a loss of consortium claim outweighs the joinder requirement:

> When, therefore, the personal injury action is tried and the consortium claim is available to be tried with it, failure to join the consortium claim to the personal injury action bars the consortium claim. This is our holding in *Thill*. **Joinder is required, however, only when the personal injury action is in suit, and then only to assure that, if the personally injury action is tried, that consortium action will be tried with it.....We decline, however, to apply the joinder requirement to settlements before trial.**

375 N.W. 2d at 482. (emphasis added.).

The rationales set forth in *Crabtree* and *Huffer* squarely apply in this case. Like the spouses in *Crabtree* and *Huffer*, Mrs. Nordgren contractually agreed to resolve her disputes out of court when she signed the Dispute Resolution Agreement[5]. Once she did so, she was contractually prohibited from filing a claim in district court that could be joined by Appellant. Despite his wife's actions, Appellant still has an independent right to bring a loss of consortium claim under Utah Law. The only way that that right to bring an independent claim can exist, and the only way that right can be meaningful, is if the Appellant is allowed to pursue his own claim in District Court, while his wife pursues her claim outside of the judicial process.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT THE UTAH HEALTHCARE MALPRACTICE ACT APPLIED TO APPELLANT'S LOSS OF CONSORTIUM CLAIM.

The trial court also found that the procedural requirements contained in the Malpractice Act applied to Appellant's claim. As Appellant's counsel argued during the

---

[5] As recently explained by the Utah Supreme Court in *Peterson & Simpson v. IHC Health Services*, 2009 UT 54, 217 P.3d 716, "Arbitration is a contractual remedy for the settlement of disputes..." 2007 UT 54, ¶ 13.

oral argument on this issue, such an application of the Malpractice Act is contrary to the Utah Supreme Court's decision in *Dowling v. Bullen*, 2004 UT 50, 94 P.3d 915[6]. (R. at 127(11-17).)

In *Dowling*, the Supreme Court reviewed the Court of Appeals' reversal of the trial court's ruling that the Malpractice Act's two-year statute of limitation barred *Dowling's* claim of alienation of affection. 2004 UT 50; *see also Dowling v. Bullen,* 2002 UT App 372, 58 P.3d 877. The facts of that case involve Dowling's former husband, James Hoagland, who attended therapy sessions with Kathleen Bullen, a social worker, during a time when Dowling and Hoagland were experiencing marital problems. During these therapy sessions, Hoagland and Bullen developed an intimate relationship and Hoagland ultimately filed for divorce from Dowling. In turn, Dowling sued Bullen for, *inter alia*, alienation of affection. The trial court granted Bullen's summary judgment motion, dismissing Dowling's claim based on its decision that her claims met the definition of a medical malpractice action, and, therefore, was subject to the two-year statute of limitation contained in the Malpractice Act. The Court of Appeals reversed the trial court's decision.

In *Dowling*, the Supreme Court affirmed the Court of Appeals' ruling and reasoning and explained that not all claims fall within the purview of the Malpractice Act simply because they stem from the actions of a health care provider. Rather, in order for the Malpractice Act to apply, "the alleged malpractice must "relat[e] to or aris[e] out of"

---

[6] Chad Nordgren's counsel provided the trial court with a copy of *Dowling*, and addressed the facts and the holding in *Dowling* during oral argument. (R. at 127 (13-16).) However, the trial court's Memorandum Decision does not address *Dowling.*

health care rendered "for, to or on behalf of a patient during the patients' medical care, treatment, or confinement." Utah Code Ann. §78B-3-403(10)[7]. In *Dowling,* the basis for Dowling's alienation of affection action was Bullen's conduct during treatment provided by Bullen to Hoagland, not an alleged deficiency in treatment provided by Bullen to Dowling. Therefore, Dowling is not the "complaining patient" and Section §78B-3-404(1)[8] does not control.

Appellant's loss of consortium claim should be analyzed under the holding in *Dowling*. There is no contention that Appellees provided any care to Appellant. All care was provided to Mrs. Nordgren, and Appellant's claims stem from that care. Therefore, Appellant is not a "complaining patient," and the Malpractice Act does not apply to his claims.

CONCLUSION

Based on the foregoing, the Court should hold that the trial court made reversible errors when it dismissed Appellant's claim, and that Appellant filed a valid, timely claim under Utah Code Ann. §30-2-11(4). Further, the Court should reverse the trial court's decision and remand this case to the trial court so the Appellant can continue to prosecute his claims.

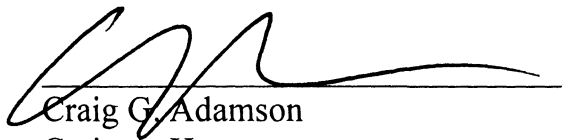
---

[7] Previously codified as Utah Code Ann. §78-14-3(10).

[8] Previously codified as Utah Code Ann. §78-14-4(1).

DATED this 6th day of December, 2009.

DART, ADAMSON & DONOVAN



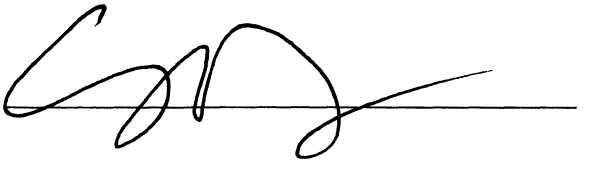
Craig G. Adamson
Craig A. Hoggan
Debra Griffiths Handley
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of December, 2009, I caused to be mailed via first-class, U.S. Mail, postage prepaid, two true and correct copies of APPELLANT'S BRIEF to the following:

George T. Naegle
Anne Armstrong
RICHARDS BRANDT MILLER & NELSON
299 South Main Street, Suite 1500
Salt Lake City, Utah 84111

JoAnn E. Bott
David C. Castleberry
MANNING CURTIS BRADSHAW & BEDNAR
170 South Main Street, Suite 900
Salt Lake City, Utah 84101



ADDENDA

A. *Memorandum Decision and Order on Motion to Dismiss*

B. Dispute Resolution Agreeement

Tab A

DISTRICT COURT, STATE OF UTAH
SEVIER COUNTY
895 East 300 North, Richfield, Utah 84701
Telephone: (435) 896-2700; Facsimile: (435) 896-8047

CHAD NORDGREN, Plaintiff, vs. **IHC HEALTH SERVICES, INC., dba SEVIER VALLEY FAMILY CLINIC, JEFFREY BROWN, D.O., individually, ROGER D. BLOMQUIST, M.D., individually,** Defendants.	**MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS** Case No. 080600330 Assigned Judge: **Wallace A. Lee**

On 2 January 2009, Defendant Roger Blomquist, M.D., filed a Motion to Dismiss and a memorandum in support. On 31 December 2009, Defendant IHC Health Services, Inc., dba Sevier Valley Family Clinic (hereinafter referred to as "IHC") and Defendant Jeffrey Brown, D.O., filed a Joinder in Dr. Blomquist's Motion to Dismiss. On 26 January 2009, Plaintiff filed a Memorandum in Opposition to Motion to Dismiss. On 12 February 2009, Defendant Dr. Blomquist filed a reply. On 13 February 2009, Defendants IHC and Dr. Brown filed a joinder in Dr. Blomquist's reply.

On 12 February 2009, Dr. Blomquist filed a Request to Submit for Decision on his motion. On 1 June 2009, oral argument was heard on the motion. This motion is now ready for a decision.

DECISION

Defendants' Motion to Dismiss should be granted.

ANALYSIS

Defendants argue Plaintiff's loss of consortium claim should be dismissed because Plaintiff was required to make his claim when his spouse asserted her claims for medical malpractice. Defendants rely on Utah Code Annotated Section 30-2-11(4) which states:

> A claim for the spouse's loss of consortium shall be: (a) made at the time the claim of the injured person is made and joinder of actions shall be compulsory; and (b) subject to the same defenses, limitations, immunities, and provisions applicable to the claims of the injured person.

The injured person in this case is Jennie Nordgren, Plaintiff's spouse. Defendants argue she made her claims 12 June 2007 by filing and serving notice with the Division of Professional Licensing pursuant to the notice requirements of the Utah Health Care Malpractice Act (hereinafter referred to as the "UHCMA")[1] Utah Code Ann. Section 78B-3-401, et seq. Plaintiff's claim was not included in the June 2007 notice and his claim was never joined in the arbitration proceedings. However, Plaintiff did provide notice of his claim on 11 September 2008.[2]

In response to Defendants' motion, Plaintiff argues his claim is timely under Utah Code

[1]Ms. Nordgren is currently pursuing her claims through arbitration.

[2]Plaintiff filed this case four days later, 15 September 2008.

Annotated Section 30-2-11, because courts treat loss of consortium claims separately from the claims of an injured spouse. *Crabtree v. Woodman*, Case No. 2:06-CV-946-TC (D. Utah, 11 Sept. 2008). Plaintiff further argues a common sense reading of Section 30-2-11(4) requires a spouse to file a loss of consortium claim only during the same time frame as the injured spouse. Plaintiff claims this was his intention, and he did so by filing before the bar of the statute of limitations.

Plaintiff also argues his claim could not properly have been included in the notice of claim filed by his spouse, because her claims are based on malpractice allegations governed by the Utah Healthcare Malpractice Act, which does not apply to third-party actions.[3] Plaintiff insists his claim is a third-party action as defined under the UHCMA.

Finally, Plaintiff claims allowing him to pursue his loss of consortium claim will result in no prejudice to Defendants. He argues this lawsuit is a separate action only because Defendants would not allow it to be joined in the arbitration proceedings. Plaintiff insists Defendants have always been aware of his claim, and that it was discussed during discovery in arbitration.

Plaintiff claims he is a third party and the UHCMA does not apply to third parties. However, the Court finds Plaintiff's claim for loss of consortium is not a proper third-party action. "A third-party action is available only to assert a claim against 'a person not a party to the

[3] "This [notice] section shall not apply to third party actions, counterclaims or cross claims against a health care provider." Utah Code Ann. Section 78B-3-412(5).

action who is or may be liable to him for all or part of the plaintiff's claim against him.'" *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 960 (Utah Ct. App. 1989).[4] That is not the case here. Therefore, the Court finds the UHCMA applies to Plaintiff and his loss of consortium claim because it allegedly arises out of injury to his spouse resulting from health care provided to her by Defendants.

As stated above, Utah Code Annotated, Section 30-2-11 requires a loss of consortium claim to be made at the same time the injured spouse makes his or her claim. Thus, the issue in this case is whether Plaintiff's spouse made a claim, for purposes of Section 30-2-11, and if so, when.

The UHCMA, which governs medical malpractice actions, defines a claim as the following:

> ""Malpractice action against a health care provider" means *any action* against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider." (emphasis added) Utah Code Annotate Section 78B-3-403(16).

Although she never filed suit in court because she had an arbitration agreement, Plaintiffs spouse began her medical malpractice action on 12 June 2007. The Court finds this action a claim for

[4] Rule 14, Utah Rules of Civil Procedure, defines third party practice. It states that a plaintiff can bring in a third party when a counterclaim is asserted against a plaintiff and a defendant can bring in a third party any time after commencement of the action when the person not a party is or may be liable to him for all or part of the plaintiff's claim against him.

purposes of Section 30-2-11.

Though his wife filed her claim on 12 June 2007, Plaintiff did not assert his claim for loss of consortium until 11 September 2008 when he sent his notice of claim to Defendants. This was more than 15 months after his wife initially filed her notice of claim. Therefore, the Court concludes Plaintiff's claim was not "made at the time the claim of the injured person [was] made." Section 30-2-11(4).

The Utah Supreme Court has held that "[s]tatutory enactments are to be construed as to render all parts thereof relevant and meaningful." *Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt.*, 143 P.3d 278, 281 (Utah 2006). Also, "[s]ubsections of a statute should not be construed in a vacuum but must be read as part of the statute as a whole." *Utah County v. Orem City*, 699 P.2d 707, 709 (Utah 1985).

Plaintiff, asserts that by filing his claim within the statute of limitations he has satisfied the statutory requirements and can pursue his loss of consortium claim. The Court does not agree with this interpretation. If the legislature had intended that a spouse need only file a loss of consortium claim within the statute of limitations then it would not have included the language that the claim be filed when the injured person makes his or her claim. Therefore, the Court finds that Plaintiff has not met the statutory requirements of Section 30-2-11 and his loss of consortium claim should be dismissed.

CONCLUSION AND ORDER

The Court concludes Plaintiff failed to follow the requirements of Utah Code Annotated Section 30-2-11. Plaintiff's claim was not made at the time his wife's claim was made. Therefore, the Motion to Dismiss is granted. Plaintiff's claim for loss of consortium is dismissed.

DATED this 28th day of July, 2009.

WALLACE A. LEE, Judge

STATE OF UTAH SIXTH DISTRICT COURTS SEVIER

CERTIFICATE OF SERVICE

On July 28, 2009, a copy of the above document was sent to the following by the method indicated:

	Addressee		Method
☑	Craig G. Adamson Craig A. Hoggan Debra Griffiths Handley Attorney for Plaintiff 370 East South Temple, Ste. 400 Salt Lake City, Utah 84111	☑ ☐ ☐ ☐	Mail Hand delivery Fax Courthouse box
☑	JoAnn E. Bott Julia M. Houser David C. Castleberry Attorneys for Defendant IHC Health Services and Defendant Brown 170 South Main Street, Ste. 900 Salt Lake City, Utah 84101	☑ ☐ ☐ ☐	Mail Hand delivery Fax Courthouse box
☑	George T. Naegle Anne D. Armstrong Attorneys for Defendant Blomquist P.O. Box 2465 Salt Lake City, Utah 84110-2465	☑ ☐ ☐ ☐	Mail Hand delivery Fax Courthouse box

Ellen Curtis
CLERK

Tab B

Dispute Resolution Agreement for Medical Malpractice Claims

Article 1 Dispute Resolution

By signing this Agreement ("Agreement") we are agreeing to resolve any Claim for medical malpractice by the dispute resolution process described in this Agreement. Under this Agreement, you can pursue your Claim and seek damages, but you are waiving your right to have it decided by a judge or jury.

Article 2 Definitions

A. The term "we," "parties" or "us" means you, (the Patient), and the Provider.
B. The term "Claim" means one or more Malpractice Actions defined in the Utah Health Care Malpractice Act (Utah Code 78-14-3(15)). Each party may use any legal process to resolve non-medical malpractice claims.
C. The term "Provider" means IHC Health Services, Inc. ("IHC") and any person or entity employed by IHC as well as independent persons or entities not employed by IHC whose practice is primarily in an IHC hospital or facility (such as anesthesiologists, radiologists, pathologists, emergency room physicians, etc.).
D. The term "Patient" or "you" means:
   (1) you and any person who makes a Claim for care given to YOU, such as your heirs, your spouse, children, parents or legal representatives, AND
   (2) your unborn child or newborn child for care provided during the 12 months immediately following the date you sign this Agreement, or any person who makes a Claim for care given to that unborn or newborn child.

Article 3 Dispute Resolution Options

A. Methods Available for Dispute Resolution. We agree to resolve any Claim by:
   (1) working directly with each other to try and find a solution that resolves the Claim, OR
   (2) using non-binding mediation (each of us will bear one-half of the costs); OR
   (3) using binding arbitration as described in this Agreement.
   You may choose to use any or all of these methods to resolve your Claim.
B. Legal Counsel. Each of us may choose to be represented by legal counsel during any stage of the dispute resolution process, but each of us will pay the fees and costs of our own attorney.
C. Arbitration – Final Resolution. If working with the Provider or using non-binding mediation does not resolve your Claim, we agree that your Claim will be resolved through binding arbitration. We both agree that the decision reached in binding arbitration will be final.

Article 4 How to Arbitrate a Claim

A. Notice. To make a Claim under this Agreement, mail a written notice to the Provider by certified mail that briefly describes the nature of your Claim (the "Notice"). If the Notice is sent to the Provider by certified mail it will suspend (toll) the applicable statute of limitations during the dispute resolution process described in this Agreement.
B. Arbitrators. Within 30 days of receiving the Notice, the Provider will contact you. If you and the Provider cannot resolve the Claim by working together or through mediation, we will start the process of choosing arbitrators. There will be three arbitrators, unless we agree that a single arbitrator may resolve the Claim.
   (1) Appointed Arbitrators. You will appoint an arbitrator of your choosing and all Providers will jointly appoint an arbitrator of their choosing.
   (2) Jointly-Selected Arbitrator. You and the Provider(s) will then jointly appoint an arbitrator (the "Jointly-Selected Arbitrator"). If you and the Provider(s) cannot agree upon a Jointly-Selected Arbitrator, the arbitrators appointed by each of the parties will choose the Jointly-Selected Arbitrator from a list of individuals approved as arbitrators by the state or federal courts of Utah. If the arbitrators cannot agree on a Jointly-Selected Arbitrator, either or both of us may request that a Utah court select an individual from the lists described above. Each party will pay their own fees and costs in such an action. The Jointly-Selected Arbitrator will preside over the arbitration hearing and have all other powers of an arbitrator as set forth in the Utah Uniform Arbitration Act.
C. Arbitration Expenses. You will pay the fees and costs of the arbitrator you appoint and the Provider(s) will pay the fees and costs of the arbitrator the Provider(s) appoints. Each of us will also pay one-half of the fees and expenses of the Jointly-Selected Arbitrator and any other expenses of the arbitration panel.
D. Final and Binding Decision. A majority of the three arbitrators will make a final decision on the Claim. The decision shall be consistent with the Utah Uniform Arbitration Act.

E. All Claims May be Joined. Any person or entity that could be appropriately named in a court proceeding ("Joined Party") is entitled to participate in this arbitration as long as that person or entity agrees to be bound by the arbitration decision ("Joinder"). Joinder may also include Claims against persons or entities that provided care prior to the signing date of this Agreement. A "Joined Party" does not participate in the selection of the arbitrators but is considered a "Provider" for all other purposes of this Agreement.

Article 5 Liability and Damages May Be Arbitrated Separately

At the request of either party, the issues of liability and damages will be arbitrated separately. If the arbitration panel finds liability, the parties may agree to either continue to arbitrate damages with the initial panel or either party may cause that a second panel be selected for considering damages. However, if a second panel is selected, the Jointly Selected arbitrator will remain the same and will continue to preside over the arbitration unless the parties agree otherwise.

Article 6 Venue / Governing Law

The arbitration hearings will be held in a place agreed to by the parties. If the parties cannot agree, the hearings will be held in Salt Lake City, Utah. Arbitration proceedings are private and shall be kept confidential. The provisions of the Utah Uniform Arbitration Act and the Federal Arbitration Act govern this Agreement. We hereby waive the prelitigation panel review requirements. The arbitrators will apportion fault to all persons or entities that contributed to the injury claimed by the Patient, whether or not those persons or entities are parties to the arbitration.

Article 7 Term / Rescission / Termination

A. Term. This Agreement is binding on both of us for one year from the date you sign it unless you rescind it. If it is not rescinded, it will automatically renew every year unless either party notifies the other in writing of a decision to terminate it.

B. Rescission. You may rescind this Agreement within 10 days of signing it by sending written notice by registered or certified mail to the Provider. The effective date of the rescission notice will be the date it is postmarked. The notice shall be mailed to "IHC Arbitration" P.O. Box 112412, Salt Lake City, UT 84147-0412 and must include your name, birth date and signature. If not rescinded, this Agreement will govern all medical services received by the Patient from Provider after the date of signing, except in the case of a Joined Party that provided care prior to the signing of this agreement (see Article 4(E)).

C. Termination. If the Agreement has not been rescinded, either party may still terminate it at any time, but termination will not take effect until the next anniversary of the signing of the Agreement. To terminate this Agreement, send written notice by registered or certified mail to the Provider at: P.O. Box 112412, Salt Lake City, UT 84147-0412. You must include your name, birth date and signature. This Agreement applies to any Claim that arises while it is in effect, even if you file a Claim or request arbitration after the Agreement has been terminated.

Article 8 Severability

If any part of this Agreement is held to be invalid or unenforceable, the remaining provisions will remain in full force and will not be affected by the invalidity of any other provision.

Article 9 Acknowledgement of Written Explanation of Arbitration

I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claim I might have must be resolved through the dispute resolution process in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and still receive health care. I understand that I can rescind this Agreement within 10 days of signing it.

Article 10 Receipt of Copy — I have received a copy of this document.

IHC Health Services, Inc.

Charles W. Sorenson, M.D.

By: **Charles W. Sorenson, M.D.**
Its Executive Vice President/COO

Jennie Nordgren
Name of Patient (Print)

Jennie Nordgren 12-30-04
Signature of Patient or Patient's Representative (Date)

For office use only: MRN:m_____